

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

ROGER BODINE and DAVID VALDEZ,

Charging Parties,

-v-

YELLOWSTONE COUNTY SHERIFF'S
OFFICE, BILL O'CONNOR, SHERIFF
CHUCK MAXWELL, and CAPTAIN
RICO BRENNAN,

Respondents.

Case #s 0068011956, 0068011957,
0068011958, and 0068011959

ORDER

The Yellowstone County Sheriff's Office, Sheriff Chuck Maxwell and Captain Rico Brennan (collectively referred to in this order as Yellowstone County) filed a motion to recuse hearing examiner Terry Spear (Spear) with the Department of Labor and Industry's Hearings Bureau (Hearings Bureau) alleging that Spear could not impartially serve on the discrimination cases filed against Yellowstone County by Roger Bodine (Bodine) and David Valdez (Valdez). The Hearings Bureau determined that Yellowstone County's motion was untimely filed under § 2-4-611(4), MCA, and denied the motion.

Yellowstone County (as designated above), then filed a petition to disqualify Spear with the Human Rights Commission (Commission). Yellowstone County argued that the Hearings Bureau erred in concluding that its motion was untimely filed because it believes the "original date set for hearing" should be reset upon any continuances. Yellowstone County also continued to argue Spear should be disqualified for lack of impartiality. Yellowstone County based its motion and petition on ARM 24.9.307. However, pursuant to ARM 24.9.107, ARM 24.9.307 only applies to claims filed before July 1, 1997. Therefore, the Commission considered the matter as if Yellowstone County based its petition on § 2-4-611(4), MCA.

Bodine and Valdez asserted that the Commission does not have jurisdiction to consider Yellowstone County's petition on the basis that Yellowstone County's petition constituted an interlocutory matter. Bodine and Valdez also asserted the Hearings Bureau correctly determined the initial motion was untimely filed. The Commission considered the matter on May 15, 2007.

The Commission reviews a decision of the Hearings Bureau under ARM 24.9.1717(2). This rule reads in part:

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the final order but may not reject or modify the findings of fact unless the commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Admin. R. Mont. 24.9.1717(2). Under this standard, issues of law are reviewed to determine if the Hearings Bureau's decision is correct. *Albright v. State* (1997), 281 Mont. 196, 205, 933 P.2d 815, 821. Section 2-4-611(4), MCA, requires in part that a motion to disqualify and attached affidavit must "state the facts and the reasons for the belief that the hearing examiner should be disqualified and must be filed not less than 10 days before the original date set for the hearing."

Here, the original date set for the hearing for Bodine was March 12, 2007 and the original date set for hearing for Valdez was March 14, 2007. Subsequently, the hearings were consolidated and set for March 26, 2007. The motion to recuse was served on March 16, 2007. Further, although the cases were consolidated, Yellowstone County does not assert that the identity of the hearing examiner changed during the relevant time period. Consequently, its motion was not filed at least 10 days before the original dates set for hearing. After careful consideration, the Commission concludes the determination of the Hearings Bureau to deny the motion as untimely is correct.

IT IS HEREBY ORDERED that the Commission affirms the determination of the Hearings Bureau to deny Yellowstone County's motion as untimely, whether phrased as motion to recuse or a motion to disqualify.

DATED this ____ day of May, 2007.

Chair Ryan C. Rusche
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this _____ day of May, 2007.

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